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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Cancels & replaces the same document of 5 November 2019****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by Spain**

3 December 2019

This document reproduces a written contribution from Spain submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.
More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

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*Spain**

1. Access to the case file

1. Spanish legislation (Transparency, Access to Public Information and Good Governance Act) establishes citizens' right of access to public information, i.e. the documents produced by public administrations in performing their duties. Any citizen can contact the public administration and request access to public information without needing to justify their request.
2. The law establishes certain limits to the right of access when, among other things, it can affect the prevention, investigation and sanctioning of administrative crimes, or the administrative functions of oversight, inspection and control. In fact, the scope of action of the CNMC, when applying the Spanish Competition Act, falls under these limits.
3. In this regard, the Competition Act and bylaws recognise that, once a disciplinary proceeding has been initiated, the interested parties may access and obtain copies of all the documents that are part of the case file, with the exception of business secrets of other interested parties or third parties, as well as any other confidential information. As a general rule, all documents related to the case file are included in it.
4. In particular, interested parties must have access to the information or documents necessary to respond to the statement of objections. As an exception to the preceding, it will not be possible to obtain copies of leniency applications or the statements of leniency applicants.
5. The general Spanish regulation governing administrative proceedings establishes that interested parties in an administrative proceeding are those who hold legitimate rights, regardless of who promoted the proceeding. Logically, those included in a disciplinary proceeding are automatically considered interested parties, while the complainant and other third parties that may find themselves affected by the outcome of the final decision must demonstrate their legitimate interest.
6. For reasons of administrative efficiency, it is common practice for the Competition Directorate not to consider individuals as interested parties. However, if requested, consumer associations have been considered interested parties, when it has been deemed appropriate.
7. The resolution by which the status of interested party is granted or denied to a third party may be appealed before the CNMC Board¹. The decision of the Board may be appealed before a Court.
8. The Competition Act establishes the duty of secrecy for anyone having access to the case files, whether they are civil servants or interested parties, providing for civil and criminal liability for breach of this duty.

* Contribution prepared by the CNMC.

¹ See, among others, decisions of the CNMC Board of 28 April 2016 (Case R/AJ/016/16 NBM) and of 21 June 2016 (Case R/AJ/025/16 GESDEGAS).

9. In addition, the resolutions granting or denying the confidentiality requested by the parties can also be appealed before the CNMC Board, and subsequently, before the Courts. Thus, both the rights of the owners of the potentially confidential documents and the rights of defence of the other interested parties in the case are guaranteed.

10. In short, with respect to the analysis of anticompetitive conducts, there is no right to access the case file during a preliminary investigation. Whereas, from the formal opening of the investigation to its resolution, all interested parties may access the non-confidential versions of the documents that form part of the case file.

11. During the investigation phase, the Competition Directorate is responsible for granting access to the case file. The documents are transferred in electronic format, both in-person and remotely. Once the proposed resolution is sent to the Board for its resolution, the Board becomes the responsible body for granting access to the file.

12. With respect to the procedure for merger control, the regulation states that natural or legal persons who may be affected by a merger may only request to be considered interested parties after a second phase investigation has been opened. Therefore, during the first phase, access to file is not envisaged, not even by the parties to the transaction.

13. Once a case has been resolved, requests for access are processed by the CNMC's Legal Services, through the procedure established in the Transparency Act. These decisions may be appealed before the Council of Transparency and Good Governance, an independent body responsible for promoting transparency in public activity. Requests for access to completed disciplinary proceedings have increased in recent years, due to the possibility of filing damages claims, although access to the information contained in the case files for this purpose can also be conducted within the civil judicial proceeding to claim damages with greater safeguards.

2. Protection of confidential information by the Spanish Competition Authority (CNMC)

14. Pursuant to the Competition Act², the authority, ex officio or at the request of the parties may, at any time, order to keep secret any information or documents deemed confidential. The regulation also specifies that all requests for confidentiality to the competent body must be motivated and include a non-confidential version of the documents.

15. Nevertheless, the concept of confidential information has not been defined specifically in the regulation. However, there is a well-established doctrine by the competition authority, which encompasses both the limits of the principle of confidentiality and the requirements that must be met in order to consider certain information confidential. This doctrine has likewise been confirmed by the Spanish courts on numerous occasions. In this regard, and in order to continue working towards effectiveness and transparency of its actions, the CNMC's 2019 Action Plan includes preparation of guides on matters related to access to the case file and confidentiality, which are currently being developed.

² Act 15/2007, of 3 July, on the Defence of Competition.

3. Analysis to determine the confidential nature of information

16. As stated above, CNMC doctrine and case law have established the procedural and substantive requirements that must be assessed when declaring information confidential or not.

17. Firstly, explicit motivation of the reasons leading to the request for confidentiality of certain information is required.³ In this regard, a clear lack of justification for the confidentiality request (for example, only providing the non-confidential version or a generic statement of the confidential nature of the document) allows the confidentiality request to be rejected without the need to analyse the background to the matter.

18. Regarding the substantive analysis of the request for confidentiality, the CNMC has implemented a three-step analysis, reaffirmed by the courts, in which it is determined:

1. **If the information truly constitutes a business secret:** disclosure of the information within the scope of the file must cause serious harm in order to be considered a business secret. The company has to provide individualised and sufficiently motivated justification of the existence of that serious harm. This first part of the analysis has been widely developed by the doctrine and the case law. Thus, and taking into account that this is a case-by-case analysis which has to be motivated by the company, the investigation body has on several occasions declared the technical and/or financial information relating to the technical knowledge of a company, amounts produced and sold, specific customer data, business strategy, etc. to be confidential.

Likewise, it has also been held that other types of information which do not necessarily constitute a business secret may be considered confidential, similarly to what is stipulated in paragraph 19 of the EU Communication regarding other types of information whose disclosure would do harm to a person or firm. In this regard, the authority's doctrine has taken into consideration the identity of a person who, while not having the status of complainant, reports the existence of certain facts.⁴

Additionally, and also in line with EC practice, it is held that information which may have been considered a business secret may lose this status due to its age. Normally, information that is five years old or more is presumed to no longer be confidential.

2. **If the information that contained business secrets, has been disclosed to third parties, losing this status:** if the data have been disclosed to third parties, the information loses its secret nature, and therefore, the capacity for its disclosure to cause harm. Furthermore, CNMC doctrine has established that if the information is known outside the company it is no longer considered confidential⁵, regardless of

³ See, among others, decisions of the CNMC Board Competition Committee of 30 April 2019 (Case R/AJ/007/19 CAF SIGNALLING 2), 7 February 2014 (Case R/0161/13 SBS), 2 April 2014 (Case R/DC/0009/14 EUROPAC) and 19 December 2018 (Case R/AJ/069/18, BEI).

⁴ Decisions of the CNMC Board Competition Committee of 24 January 2014, Case R/015/13, Transportes Carlos, and 2 April 2014, Case. R/DC/0009/14, Europac.

⁵ Decision of the CNMC Board Competition Committee of 02 April 2014, Case R/DC/009/14, Europac.

whom disclosed it. Along these same lines, CNMC doctrine does not usually consider confidential the information shared among various competitor companies.

3. **If despite being business secrets, they are necessary to establish the facts in the proceeding**, as well as to guarantee the rights of defence of the investigated: similarly to the EC, CNMC doctrine⁶ has established that confidentiality cannot be an obstacle if such information is necessary to determine whether or not an infringement has been committed. Hence the possibility of using information which is essential for the investigation, although it may be considered business secrets. The use of this criterion cannot be arbitrary; on the contrary, the information must at least have the ability to prove facts related to the investigation or refute statements made by any of the companies as part of the proceeding. Likewise, in merger control proceedings, any information that may be necessary to understand the assessment made, can be considered non-confidential, including business secrets.

3.1. Special features of confidentiality in leniency applications

19. When a request for exemption from payment and/or reduction of the fine is submitted before the Competition Directorate (the so-called leniency application), Spanish Regulation stipulates that the very fact of the submission of a request for exemption or reduction of the fine shall be considered confidential. Furthermore, it will set up a special separate record with all the data and documents for the request considered confidential, including, in any case, the identity of the applicant⁷.

20. However, this confidential treatment is not permanent. According to the regulation, confidentiality will be lifted after the statement of objections is notified to the interested parties, so that they may exercise their rights of defence and access any necessary documents. In any case, the parties cannot obtain copies of the applicant's statement.

21. The leniency applicant can request the confidentiality of the information included in the leniency application. The investigation body will then conduct an assessment following the three-step analysis indicated above.

22. With regard to possible damages actions for breach of the antitrust rules before the courts, the exhibition of the statements within a leniency programme as well as the settlement requests may never be ordered, nor before nor after the CNMC's decision⁸.

4. Procedural aspects

23. Once a confidentiality request has been submitted by a company, and after having verified that the request is motivated and includes a non-confidential⁹ version, the

⁶ Among others, Board decisions of 29 November 2016 (R/AJ/632/16 TOP CABLE), 21 December 2017 (R/AJ/060/17, ALTADIS 2), 19 December 2018 (R/AJ/069/18, BEI), 30 April 2019 (R/AJ/007/19 CAF SIGNALLING 2), 11 July 2019 (R/AJ/033/19 ADVANCED ACCELERATOR APPLICATIONS IBÉRICA, S.L.U) and 18 July 2019 (R/AJ/055/19 NOKIA 2)

⁷ Article 51 of the Defence of Competition Regulation.

⁸ Article 283 bis i) of Act 1/2000, of 7 January, on Civil Procedure.

⁹ Article 20, Defence of Competition Regulation.

investigation body carries an assessment of the request, following the criteria set out above. Should the request not meet the requirements, the company will be asked to amend the request within five days, indicating that, if this does not happen, the request will be considered withdrawn.

24. Regarding the timing for the submission of the confidentiality request, although the Competition Act indicates that it may be ‘requested at any time’, usually the investigation body will require it when the information is incorporated to the case file (either from an inspection or from an information request).

25. If the request has been submitted correctly and the investigation body, having assessed it, considers it appropriate to declare the requested information confidential, the interested party will be notified. Both the resolution and the non-confidential version of the information provided by the party are included in the case file, indicating that the confidential version is included in a separate record of the file.

26. If the investigation body does not accept the confidentiality request, entirely or partially, the party is also notified. The investigation body will motivate the denial of the request according to the three-step analysis, indicating the possibility of lodging an appeal before the CNMC Board, within 10 working days. During this period, the information will remain confidential. Once this time has elapsed, if no appeal has been lodged, the documents will be included in the public case file.

27. In those cases in which the confidentiality agreement is appealed before the Board, the information is considered confidential on a precautionary basis, and is not included in the public case file until the CNMC Board has reached a decision on the appeal. With regard to this, the decision of the CNMC Board can be appealed before the National Court, within two months. If an interim measure is requested, the info will be kept confidential until the National Court a decision on the interim measures.

28. Article 18 of the Competition Act and article 12 of Regulation 1/2003 provide for the possibility of information exchange with the European Commission and the national competition authorities of other member states, including confidential information, in those cases where articles 101 and/or 102 of the TFUE apply. This is notified to the parties when the investigation body requires confidentiality.